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SOME PERSPECTIVES ON
ENVIRONMENTAL REGULATION
IN MONTANA

Submitted to:

Montana International Trade
Commission
Suite 415
Power Block Building
Helena, Montana 59601

WESTERN ANALYSIS

P. O. Box 287 • Helena, Montana 59601 • Telephone (406) 443-3420

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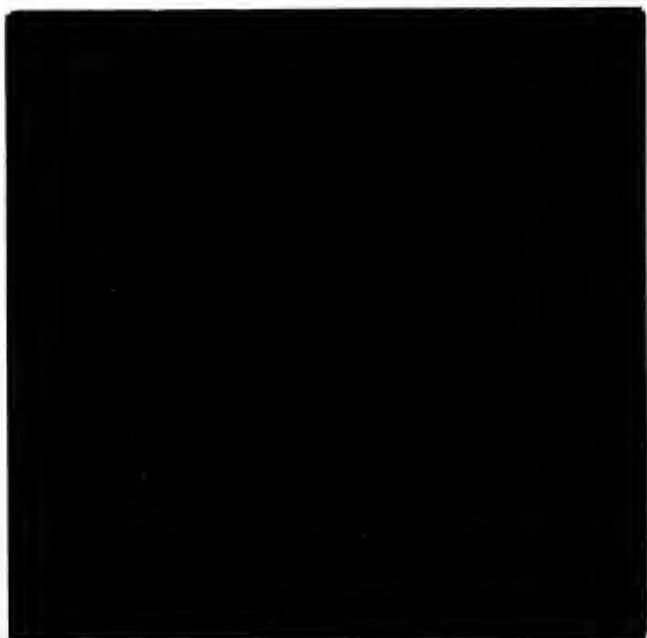
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ENVIRONMENTAL REGULATION
IN MONTANA

Submitted to:

Montana International Trade
Commission
Suite 415
Power Block Building
Helena, Montana 59601

Submitted by:

Western Analysis, Inc.
P.O. Box 287
Helena, Montana 59601

March 1981

EXECUTIVE SUMMARY

Today, there is a general consensus in Montana that sincere and resonable efforts should be made to ensure that government regulation is effective and is discharged in a responsible and consistent manner. This will require a new sense of cooperation and common purpose between the public and private sector.

This paper is intended to provide an overview of some of the major issues surrounding environmental regulations in Montana, with emphasis on the Major Facility Siting Act (MFSA), and Montana Environmental Policy Act (MEPA). Time has not permitted an indepth review of specific standards, but instead we have attempted to bring an objective, common sense approach bear on the major policy and administrative issues. With continued cooperation among the interested parties, the following suggestions may result in a more realistic approach to regulation on the part of government, greater awareness of the permitting process on the part of industry, and mutual recognition of the common goals and aspirations shared by each.

Major Facility Siting Act

The MFSA was enacted in 1973, and initially regulated only the production of electricity and synthetic fuels. In 1975, the act was amended to include any facility (utility or non-utility) "utilizing, refining, or converting 500,000 tons of coal per year or more". The MFSA attempts to ensure that energy conversion facilities produce "minimal adverse impacts" on the people and environment of Montana. The law requires that the state issue a "certificate of environmental compatibility and public need" prior to the construction of covered facilities. Although the 1979 Legislature made many improvements to the act (see page 5), the following principal recommendations will further streamline the administrative processes and clarify the remaining ambiguities. It is to the benefit of both industry and government to have clear and specific laws **and** regulations in order to avoid third party litigation.

* The definitions of "facility" and "utility" are all inclusive, and do not clearly identify a "non-utility". These definitions should be clarified, or facilities providing "market" outputs be specifically identified as excluded from the "need" analysis requirements.

* The applicant should be required to first file the "intent to apply", which would begin Phase I and only contain the applicant's data regarding 'need'.

* It appears that the air and water quality functions of the Montana Department of Health and Environmental Sciences (DHES) will be moved to the Montana Department of Natural Resources and Conservation (DNRC). This will clarify the ambiguities regarding air and water quality in the law.

* The "need" provision should not apply to facilities producing commodities which go directly into the private market system. It should apply only to facilities producing

electric power or synthetic pipeline gas to be mixed with natural gas, for direct public consumption in Montana.

* Since public "need" is ambiguous, "use" is a more appropriate term. "Use" must be defined on the basis of how much power will be used, not how much power is needed in a theoretical sense.

* The state should investigate the value of conducting an "avoidance area" site screening process in advance of facility siting applications. This process might increase the predictability of the review process, reduce the uncertainty facing the applicant, and reduce the review time and costs.

Montana Environmental Policy Act and Environmental Impact Statement Process

The MEPA was enacted by the 1971 Legislature, and explicitly modeled after the 1969 National Environmental Policy Act. MEPA established a state policy for the environment and directed state agencies to incorporate environmental values into their decision-making processes. An environmental impact statement (EIS) process was instituted to evaluate "major actions of state government significantly affecting the quality of the human environment".

Federal courts have interpreted the national law as requiring that MEPA criteria be considered, along with the more specific criteria in the permit granting statutes, when agencies make decisions. In Montana, MEPA has been construed more narrowly, and is primarily procedural in practice. The state government and industry generally support this interpretation. The following recommendations will tend to make the EIS process more useful as a decision-making tool.

* MEPA should require that when adverse impacts are identified, mitigative measures are adopted and enforced.

* The state and potential applicant should communicate openly and early in the pre-application process to ensure that initial applications are complete.

* A pre-EIS scoping process should be required to receive public input and identify major issues.

* Study times under all permit granting statutes should be made flexible to allow for case-by-case negotiations. All permit granting statutes should contain explicit provisions for writing EIS's under MEPA.

* The draft and final EIS's should contain all proposed mitigative measures and the draft EIS should contain the agency's "tentative" decision.

Additional Considerations

* The state must ensure that its representatives and employees carry out their functions in a spirit of cooperation with the private sector and objectively administer state laws and regulations.

* The state should adopt a "grandfather clause" concept

wherein facilities, once adopting a compliance schedule toward meeting environmental regulations, would be exempt from new related regulations for a specified period of time.

* Governor Schwinden and the legislature have recommended a major step toward needed consolidation of resource management and environmental regulation programs. Logical extensions of these initiatives should be investigated.

* Although citizen participation is necessary to our democratic form of government a consensus has emerged that the Citizen Board process could be improved. Some suggestions are to have all boards perform only an appellate review function, do away with the boards and give final permit granting decision power to the department director, or organize a single board comprised of several agency directors. A combination of these changes might improve administrative efficiency and return political accountability to the decision process.

ACKNOWLEDGEMENTS

We would like to thank the following individuals for their efforts in assisting our understanding of the issues raised in this report: Governor Ted Schwinden, Leo Berry, Gerald Mueller, Paul Schmechel, John Ross, Steve Brown, Dave Gleason, Ward Shanahan, Randy Moy, Bob Marks, Bobby Spilker, Lewis Chittum, Bob Kiesling, Ted Doney, Bill Weiland, John Bartlett, J. A. Schuchart, Mike Wilson, Fred Swanson, Mike Meloy, and Steve Perlmutter. A special recognition goes to the Montana International Trade Commission, sponsor of this project.

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INTRODUCTION

Today, there is a general consensus in Montana that sincere and reasonable efforts should be made to ensure that government regulation is effective and is discharged in a responsible and consistent manner. Over the past decade, the public has consistently reaffirmed its demand for strong environmental laws and industry has acknowledged its environmental responsibilities. Renewed interest in economic growth and development, however, coupled with recent plant shutdowns and continued declines in real purchasing power, have led to a major public debate over the relationship between state government and the regulated natural resource industries. This situation is neither unique to Montana, nor unexpected.

For the foreseeable future, resource extractive and processing industries will continue to be the major thrust of economic development and industrialization in Montana. It is precisely these types of developments which require substantive state review under the environmental protection laws mandated by our legislature. Although these statutes and procedures may be considered strict, the people of Montana have considered them necessary to protect our environmental resources and preserve our high quality of life.

The recent debate over regulation has focussed as much on process, image, and attitude as on the standards themselves.

Industry reportedly perceives Montana as having a very poor attitude toward economic development, and claims that the state takes an adversarial position toward development initiatives. Statistical analyses provided by New York investment bankers consistently rate our Public Service Commission at or near the bottom among the fifty states in terms of the earnings it allows the regulated utilities. A recent publication of Chase Econometrics, Inc. rated Montana's congressional delegation as "Moderately Anti-Business", one of the thirteen states to share that designation. A recent survey of natural resource firms operating in Montana, conducted by the Bureau of Business and Economic Research at the University of Montana, indicated that the most often mentioned difficulties with state regulation were unnecessary and excessive time delays in the permitting process, and inflexible and inconsistent administration of the statutes. More than two-thirds of the respondents reportedly believed that state regulation is a hindrance to economic growth.

Consistency, delay, and attitude are key words in this public debate. Environmental laws and regulations are new to the nation and to the state, and will continue to evolve and be refined. Certainly, changing standards should be examined carefully when they may result in costly changes to existing facilities. Delays in processing applications partly are a result of the newness of our laws, but also reflect a fundamental difference in

perception between the public and private sectors; in business, time means money, and delays mean increasing costs. Private investments are analyzed in terms of financial risk and return. Delays increase cost and reduce return on investment, and the uncertainty and inconsistency in the permitting process increase the perceived risk of the initial investment. In the public sector, time spent in the review of development proposals is seen as reducing the likelihood of public costs.

Testimony received at the December meeting of the Montana Legislature's Subcommittee on Economic Problems highlighted these concerns. Ralph Cox and James Marvin of the Anaconda Company emphasized the overriding importance of stability and consistency in legislation and in regulation, and the need for reasoned, realistic and understandable regulation. These objectives certainly are desirable, but they only can be achieved through a new sense of cooperation and common purpose between the private and public sectors. It is in the common interest to achieve current and future economic well being while maintaining the integrity of our environment. This perception is more than merely a laudable goal, it is a new order of cultural awareness that, if attained, will be a milestone in social and economic progress.

This paper is intended to provide an overview of some of the major issues surrounding government environmental regulation in

Montana, with emphasis on the Major Facility Siting Act (MFSA) the Montana Environmental Policy Act (MEPA), and administrative problems common to these and other statutes. Time has not permitted definitive legal and functional analyses, nor has it allowed for an in-depth review of specific environmental and health standards.

This project was approached through research of the legislative history and background of the relevant statutes, review of the few available analyses of the issues, and interviews with many individuals in and out of government who have been actively involved in the laws and their implementation. We have attempted to be objective with the issues, and to present them in a clear and non-technical fashion. With continued cooperation among the interested parties, this process may result in a more useful and balanced approach to regulation on the part of government, greater awareness of and interest in making the permitting processes work more effectively on the part of industry, and a recognition of the importance of the common goals and aspirations shared by each.

MONTANA MAJOR FACILITY SITING ACT

The Major Facility Siting Act (MFSA) was enacted in 1973, and originally was known as the Utility Siting Act. It initially

was enacted to regulate the large scale production of electricity and synthetic fuels, in order to mitigate the adverse environmental impacts of major power plants. The act was amended substantially in 1975 to include under its review process all large conversion facilities and any facility "utilizing, refining, or converting 500,000 tons of coal per year or more"(75-20-104 MCA). The act now applies to utility and non-utility coal conversion plants.

The MFSA is intended to "ensure that the location, construction and operation of power and energy conversion facilities will produce minimal adverse effects on the environment and upon the citizens of the state" (75-20-102(2) MCA). In order to accomplish this goal, the law requires that the state issue a "certificate of environmental compatibility and public need" (75-20-102(2)MCA) prior to the construction of any power or energy conversion facilities in the state.

The 1979 legislative session enacted the following major changes in the administrative and decision-making procedures of the act:

(1) The application for certification is filed jointly with the Montana Department of Natural Resources and Conservation(DNRC) and the Montana Department of Health and Environmental Sciences(DHES).

(2) At the applicant's request a joint hearing may be held before the two respective Citizen Boards.

(3) Applicant fees for the review process are no longer fixed, and instead are based upon estimated study costs, up to a set maximum.

(4) The DNRC's report must be completed within twenty-two months of receipt of the complete application, two months less than previously.

(5) The DHES must make its recommendation on certification for compliance with air and water quality laws to its Board within twelve months of receipt of application; this Board has up to an additional six months to render its decision.

(6) Nine months has been set as the maximum length of time for the hearing before the Board of Natural Resources (BNR); the BNR must make its decision within sixty days after receipt of the Hearing Examiner's recommendation.

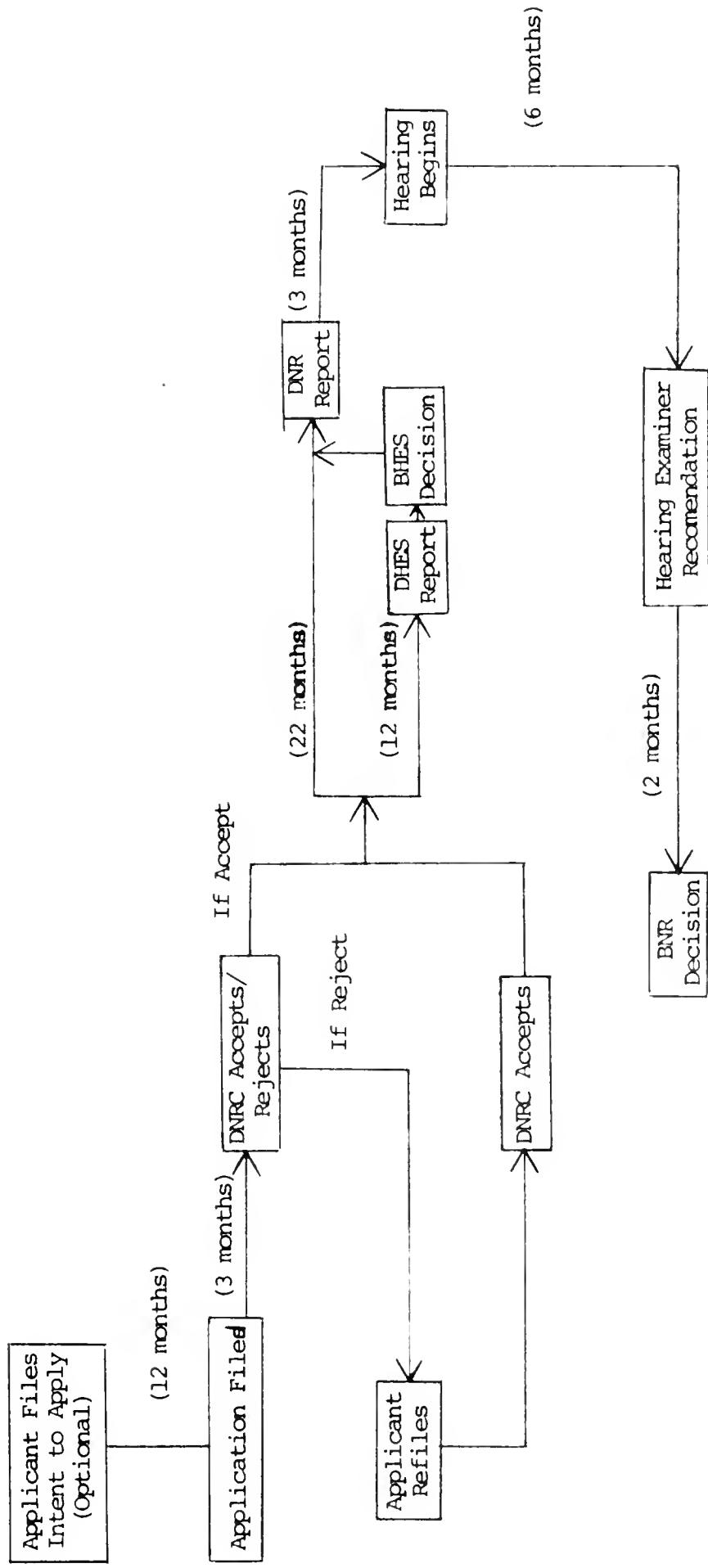
(7) The hearing is no longer conducted solely under the contested case provisions of the Administrative Procedures Act, but now is governed by rules adopted by the BNR and the Montana Rules of Evidence.

(8) The hearing process now contains specific criteria for conducting the hearing, and provides a logical framework for "parties" to express their concerns.

Diagram 1 illustrates the Application and Certification Process. Assuming that the initial application is complete

DIAGRAM 1

MFSA APPLICATION AND REVIEW PROCESS



and accepted, that the maximum time frames allowed are taken, and that the BNR takes two months to render a decision after the recommendation of the Hearings Examiner, the process will take three years from the filing date of the application to the time the BNR's decision is made. Any court challenges to the BNR's decision will stretch out the time frame, as will a department decision that an initial application is incomplete. Since both these events are likely, it is fair to assume that the certification process, under the present statute, could take roughly four to five years. At an annual rate of inflation of ten percent a four year review process would increase the original cost of a facility forty-six percent or, for example, from \$500 million to \$730 million. This cost would balloon to \$805 million if a fifth year were required.

Streamlining

Specific and unambiguous laws and regulations will minimize the possibility of third party litigation following the permitting process. Notwithstanding improvements made by the 1979 legislature, many parties to the siting process believe that much still can be done to expedite state review of proposed energy facilities. The ever present threat of federal preemption underscores the urgency of streamlining. Essentially,

all the following issues discussed can, when resolved, lead to more efficient and rational decision-making. The three areas most specific to streamlining the process are:

- 1) Procedures
- 2) Criteria and Decision-Making
- 3) Joint Review

The twenty-two month review period can be shortened if the review process is divided into two stages: Phase I, where the "need" and "cost-effective" determinations are made, and Phase II, the environmental compatibility assessment. The utility contemplating an application would be required to file the "intent to apply" at least six months before the final application. If the utility were to incorporate this Phase I application into its routine planning process, there would be no net increase in review time. This Phase I application would include only enough data to allow the reviewing agency to decide upon need. If the agency agrees with the applicant's need determination and decides that the plant represents the most cost effective technology, the Phase II application would be submitted, and the ensuing study time consequently would be reduced somewhat, to say, fifteen or eighteen months. If the Phase I application is rejected the application and study process would end.

Communication between the applicant and state begun with the Phase I application will significantly increase the probability that the Phase II application will be complete. Rejection

of a Phase II application would result in at least a six month up-front delay.

The extra time gained would allow the state, the applicant, and the affected public to complete an impact statement scoping process. This process would permit a review of the various issues and decision criteria to determine which are more, and which less, important prior to the preparation of the impact statement. This process is discussed more fully later.

An interesting suggestion for a slightly different review process has been made by Mr. Gerald Mueller of the Governor's Office. He feels that the issues surrounding facility siting are either policy or technical in nature. There are three policy issues; need, least-cost technology, and plant location. These three issues should, he suggests, be resolved during the Phase I application and review process. After this process the applicant would formally design the plant and submit the Phase II application. The Phase II review would only cover the environmental compatibility of a specific plant design for a specific site.

The July, 1978 administrative rules implementing the MFSA are quite detailed and lengthy. One area which may benefit from streamlining is the four page section on requirements for alternative site information. It appears that this is unnecessarily lengthy and cumbersome. This may be because the statute itself is vague concerning the role of alternative

site criteria in the decision-making process. The statute and rules can be made clearer by limiting the alternative site analysis for utilities to only one or two alternative locations and omitting sites outside the state. Finally, in the event that a utility applicant's site selection process is explicit and involves the public, as in the Resource 89 project, the state should have the flexibility to omit the alternative site criteria from its review process. This would require that the state and utility fully cooperate in the siting process from the beginning.

The alternative site analysis raises a perplexing problem when applied to non-utility applicants with private sector outputs. Certainly, these plants are sited largely on the basis of economics. The information upon which these economic decisions are made is largely proprietary, so the state has only limited access to why the proposed location is optimal for the applicant. However, the state does have a valid responsibility in trying to minimize environmental and socio-economic costs resulting from the facility. Clearly, the non-utility applicant should be treated differently during the alternative site analysis. This particular problem should be addressed during the proposed study by the interim study committee recommended by Senator Steve Brown in Senate Joint resolution 14 presently before the legislature.

Several substantive procedural problems were resolved by the 1979 legislature, including clarifying the Hearing

Examiner's role with respect to prehearing conferences and orders and the stipulation that only "active" parties could bring a court challenge to the Board's decision. A problem area still remains in the decision-making process with respect to evaluation and weighting of the various criteria mentioned in the laws. Presently, Sections 75-20-301 and 75-20-503, MCA refer to criteria to be considered when ruling on an application. The DNRC and BNR also are given authority to "add by rule" to the existing "laundry list" of environmental factors (75-20-503, MCA). Further, the Board may consider "any other factors that it considers relevant"(75-20-201(3)(e),MCA) in determining "public interest, convenience and necessity". A survey of the administrative problems this poses follows.

The balancing decision presently required of DNRC is so complex that it invites disbelief. The Act, as it now stands, invites unbridled administrative discretion because if its absence of guidance with respect to ranking the many considerations. The recommendation of the American Bar Association study group should be followed: the siting agency "should be guided by legislative criteria in reaching its balancing decision. These criteria should define the public interest, and identify the values to be considered and their relative priority."⁽¹⁾

In our judgment, the suggestions above will help further streamline the process. Requiring "notice of intent" and resolving need issues may shorten the environmental review process from twenty-two to eighteen or fifteen months. The application review itself probably could be completed in two months instead of three, and the BNR hearing could be done in six instead of nine months. It should be reiterated that the consequent eight

to ten month time saving is absolutely dependent upon the applicant's cooperation in the process six months early and communicating fully with the agency concerning application requirements. We urge the interim study committee mentioned above to carefully consider measures which may shorten the review process while maintaining the integrity of the act.

Jurisdictional Disputes

Today, there is little formal cooperation between states and the federal government in reviewing utilities' applications for energy facilities. Further, there are jurisdictional disputes when the Bonneville Power Administration gets involved in planning and ownership of a utility system. Most important, the recently passed Pacific Northwest Electric Power Planning and Conservation Act mandates substantial regional planning, the jurisdictional impacts of which are at this time unknown. Notwithstanding these actual and potential conflicts there is an obvious and immediate need to eliminate overlap in the preparation of government reviews and impact statements. At a minimum, environmental assessments and need-for-power reviews should be consolidated and done jointly with the relevant federal agency. Currently, the DNRC and the U.S. Forest Service and Bureau of Land Management have agreements to work jointly on projects involving federally managed lands. DNRC is interested in getting a similar cooperative agreement with Bonneville Power Administration when it is involved in an

application. Resolution of this issue may be forced by the passage of the above mentioned bill. The long standing disagreement over the respective roles of the DHES and the DNRC has not yet been resolved. Section 75-20216(3), MCA states that the Board of Health & Environmental Sciences (BHES) decision on all matters of air and water quality is "conclusive" but that the BNR "retains authority" to determine "that the facility represents minimum adverse environmental impact"(Section 75-20-301(2)(c) MCA). This stipulation is ambiguous and poses an invitation to litigation over its meaning and ultimate resolution. It is the opinion of the Facility Siting Division that this stipulation provides BNR the authority to reject an application if it concludes that the air or water quality impacts on the social and natural environment are significant, and not mitigable.

Past attitudes toward the DHES and the BHES approach to setting and enforcing air quality standards, and the legality of emission standards, probably led to the inclusion of this language in the statute. Regardless of the original thinking, there no longer appears to be any need to second guess the DHES approach to setting air quality standards. The ambiguities cited should be resolved by giving the DHES final determination over all air and water quality impact issued and by deleting any language allowing for BNR review of that decision. One must assume that the state agency designated to enforce air and water quality standards is doing its job, and that

the lengthy process of setting the ambient air quality standards and water standards will be in the best interests of Montana citizens. Such standards should not be subject to another agency's after-the-fact review.

Governor Schwinden's and the legislature's efforts to reorganize state environmental and resource management responsibilities may partially resolve this jurisdictional issue.

If Senate Bills 258 and 430 pass and the subdivision, solid waste, and air and water quality review functions are moved from DHES to DNRC, responsibilities under MFSA will be in one agency. This will make it much easier to administratively resolve the air and water quality review problems.

Need Determination

One of the two criteria for certification under the MFSA is a determination of "public need" for the facility. There is substantial disagreement over the types of facilities this applies to, which agency should have the review function, the strict definition of "need" and analytical techniques for determining that need.

Sections 75-20-301(2)(a) and (q), MCA state that the RNR may not grant a certificate unless it determines "the basis of the need for the facility," and "that the facility will serve the public interest, convenience, and necessity." Section 75-2-301(4), MCA states that "considerations of need, public need . . . convenience and necessity. . . shall apply only to utility facilities."

This implies that non-utilities, such as the Dreyer Brothers fertilizer plant proposed in McCone County, may not be subject to the test "need". However, the definitions of "facility" and "utility" in the act are all inclusive, and state respectively any plant converting "500,000 tons of coal per year or more" and any plant producing or furnishing "hydro-carbon products, or energy in any form for ultimate public use . . ." (Sections 75-20-104(10) and (13), MCA). These stipulations are ambiguous and require clarification. For example, plants producing fertilizer from coal would be considered utilities under this definition. Also, one could endlessly debate "energy in any form" includes.

The key question is whether the MFSA "need" provision applies only to regulated utilities, to utilities furnishing power for direct consumption, to non-regulated plants producing liquid fuels, to plants producing non-fuel products, or to some variation of these four classes. This question reduces to a philosophical argument over the proper role and scope of government in the free enterprise system. One area of agreement appears to stand out; that the MFSA "need" provision should not apply to the production of commodities which go directly into the private market system, such as fertilizer. In order to clear up this ambiguity, the definition of "facility" and "utilities" should be clarified, or facilities providing "market" outputs be more specifically identified as excluded in Section 75-20-301(4).

The first step of the siting process, the determination of "need" for the energy facility may best be carried out by the Montana Public Service Commission (PSC). Forecasting energy demand is an essential part of the ratemaking process, and can most efficiently be carried out by the agency responsible for that function. Section (75-20-501(5)) requires that the applicant identify a potential facility in a long-range plan at least two years prior to submittal of an application. Although this is not a substitute for the Phase I application, the reviews necessary to resolve the "need" issue could begin at this earlier point in time.

An area of continued disagreement, again based largely on philosophies concerning government regulation, concerns whether synfuel plants ought to meet the "need" criteria. The law as written appears to include this class of plant, although it certainly is not a regulated utility in the traditional sense. In addition, the analytical approach to assessing "need" for synthetic gas or oil would not be clearcut or easy to define.

This debate normally centers on the divergent notions that, a) state government has a role in shaping our energy future, and therefore should certify these plants on the basis of "need", or b) that energy production decisions should be left solely to the private marketplace, and outside the scope of governmental influence. This argument is overly simplistic, since the federal government already has

established a policy of encouraging synthetic fuels development. Further, there is currently a substantial degree of government intervention in the fuels industry. The more direct question is whether state government should have any influence on synfuels development outside its environmental permitting authority. Although the regional parameters of the "need" determination for synthetic fuels may be particularly complex, we feel that the state has a valid role in ensuring that Montana's needs are met by synfuel plants located here. We support the suggestion that the proposed interim committee recommended in HJR 14 further study this issue.

Another approach to ensuring a state government role in directing the pace and scope of synfuels development would be to establish a legislatively mandated synfuels policy through (a) explicitly designating the upper bounds to in-state synfuels development, and (b) conducting an "avoidance area" plant siting study defining where synfuel facilities could not be constructed. Issues of "need" then would be moot, the only questions being how many plants, where, and the continued provisions that they meet all applicable environmental standards.

Provisions of the Pacific Northwest Electric Power Planning bill mentioned earlier ultimately may supercede individual state determinations of "need" for thermal electric generating plants producing power for use in the Bonneville Power Administration service area. Bill provisions require

the Regional Council to adopt a plan setting forth electrical power needs and authorizing Bonneville Administration purchase of the new power required.

This effectively requires multi-state "need" assessments and plant requirements. We feel federal initiatives may eventually preclude future Montana only involvement in determining "public need" for conventional electric power plants, except in those cases where the Bonneville Power Administration has not contracted to purchase the output, or the plant output is only to be used instate or outside the Bonneville Power Administration service area.

The determination of public need is made by reviewing the utilities load growth, a projection of how much electricity will be consumed in the utilities service area. Accurate load forecasts are difficult to make because of increasing energy prices, conservation measures, and changes in technology. The problem is further complicated by three issues: 1) the definition of need, 2) the quantification of need in a particular area, and 3) the best way, (most economical technology), to fulfill the need, once it is established.

As discussed earlier, need depends upon market forces; anything produced and purchased is needed, regardless of its environmental costs or social value. The market does not distinguish between products that you need or don't need. That decision is made by the consumer. For similar reasons, the need for additional electrical power cannot

be defined on moral grounds. Need, if it is to be measured in any respect, must be defined on how much power will be used, as opposed to how much power is needed in a theoretical sense. For example, a common misconception is that if everyone in Montana would insulate properly, turn down the thermostat, and employ the most efficient conservation technologies available, there would be no need for more power. Although this is unlikely, conservation and rising energy prices will continue to lessen the growth rate of energy consumption, an event that has seldom been included in electrical load forecasts.

Since utilities operate in unique service areas, they must make their forecasts for their own respective markets. However, utilities often sell power to other utilities. Sometimes, these other utilities are out of state. Therefore, it becomes necessary to determine need over a much larger area, i.e., the whole region, not just a state or in-state service area. This requires careful planning between utilities and greatly complicates the forecast problem.

Once a determination has been made concerning how much additional power will be consumed, it becomes necessary to decide how the power will be produced, i. e., which technology will be needed. This determination should be made on the basis of output efficiency -- cost per unit of power produced. Since the utility is regulated by the public sector, cost of production is of primary concern.

Our recommendations concerning the "need" criteria can be summarized as follows:

- 1) Since public "need" is ambiguous, we feel that a more appropriate term is "use". Need must be defined on the basis of how much power will be used.
- 2) "Use criteria should apply only to utilities producing electric power or synthetic gas, where the gas is intended for direct public consumption in Montana. There should be two classes of need: in-state and out-of-state, where the applicant's percent of ownership of plant power is compared with "use" projections for that specific area.
- 3) The state's review of utility load growth projections should be done during Phase I. This review function is consistent with the recommendations of the Legislature's Interim Study Committee on Energy Forecasts.
- 4) Synfuel plants producing synthetic gas for consumption outside Montana, or any other synthetic fuel, should be exempted from the "use" criteria provisions. At the same time, the state should investigate conducting a systematic "avoidance area" siting study. The state should ensure that Montana's fuel needs are supplied by synfuel plants which locate in Montana.
- 5) Facilities producing "free market" outputs should be explicitly excluded from having to meet the "use" criteria. A problem will arise when a facility may produce both synthetic gas for direct in-state public consumption and a private market

output. This should be resolved by the interim study committee mentioned above.

Siting Study

The alternative siting study process mandated by the MFSA is conducted in a piecemeal manner, i. e., plant by plant, and commonly is reactive rather than prospective. Recent analyses of the siting process conclude that it is necessary and feasible for state to undertake a site screening process in advance of facility applications^(1,2). If effectively done, a formal of the siting process conclude that it is necessary and feasible for state to undertake a site screening process in advance of facility applications^(1,2). If effectively done, a formal siting process may serve to further streamline the review process, and strengthen the state's ability to influence future energy conversion developments. Once completed, it would act to increase the predictability of the review process, reduce the uncertainty and risk facing the applicant, reduce the time necessary for review, reduce administrative costs, and perhaps even ultimately eliminate the alternative site criteria of the MFSA decision making process. In order to accomplish this end, it is necessary to address the problem before it occurs. This requires understanding and cooperation between interest groups, the public and government agencies. We urge the interim study committee to address this issue in detail.

There are two general approaches to site screening. The "avoidance area" approach identifies areas of the state where

facilities cannot be built; the "preferred site" approach specifies sites where they can be built. Variations exist such as sites preferred for development, suitable for development, suitable for development under exception only, and unsuitable for development.

Montana has already acknowledged the value of site screening through an amendment to the Strip and Underground Mine Reclamation Act passed by the 1979 legislature. This amendment allows persons to petition the state to have an area designated as unsuitable for coal mining. In our judgment, this "avoidance area" approach is the preferred way to proceed because it allows the future applicant to exercise a considerable degree of discretion in choosing its specific site, or sites. Additionally, this approach is desired because it would be less costly and would require a shorter period of time to complete.

A vitally important first step in the process is the designation of appropriate criteria on which the "avoidance area" decisions are to be based. Conceptually, these criteria may include environmental, economic, and socio-cultural factors. Because facility economic and engineering considerations can change over time, it may be prudent to initially consider only environmental, socio-cultural, and public economics criteria when choosing avoidance areas. The criteria could be expanded at a later date to consider other factors.

A second critical need is to ensure credibility in the process. The committee responsible for choosing and weighting criteria, and for generally overseeing the work, must comprise well qualified individuals of bipartisan makeup, who are representative of the public and private sectors. In this manner, public perspectives toward social, economic, and natural resource impacts can be integrated thoroughly into the decision process. It may also be advisable to have much of the work done by independent contractors jointly chosen by the state and regulated utilities.

MONTANA ENVIRONMENTAL POLICY ACT AND EIS PROCESS

The Montana Environmental Policy Act (MEPA) was enacted into law by the 1971 legislature. According to its chief sponsor, it was explicitly modeled after the 1969 National Environmental Policy Act (NEPA). The basic statements of policy and purpose are unchanged from the national act, with the exception of two minor variations in wording. According to its sponsor, MEPA directs the state to ensure that its citizens are guaranteed a healthy environment. Testimony presented during the hearings on MEPA indicates that MEPA originally was interpreted as not strictly environmental in nature, but rather designed to make environmental criteria coequal with existing criteria affecting state government's decision-processes.

MEPA established a state policy for the environment and directed state agencies to incorporate environmental values into their decision making processes. Section 75-1-103(1), MCA states that "it is the continuing policy of the State of Montana . . . to create and maintain conditions under which man and nature can coexist in productive harmony and fulfill the social, economic, and other requirements of present and future generations . . .". The law also states that its policies and goals are supplementary to all other policies and goals of the state.

MEPA provides for an environmental impact statement process that must precede "proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment" (Section 75-1-201 (2)(c), MCA). The general purpose of this process is to "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations" (Section 75-1-201 (2) (b), MCA).

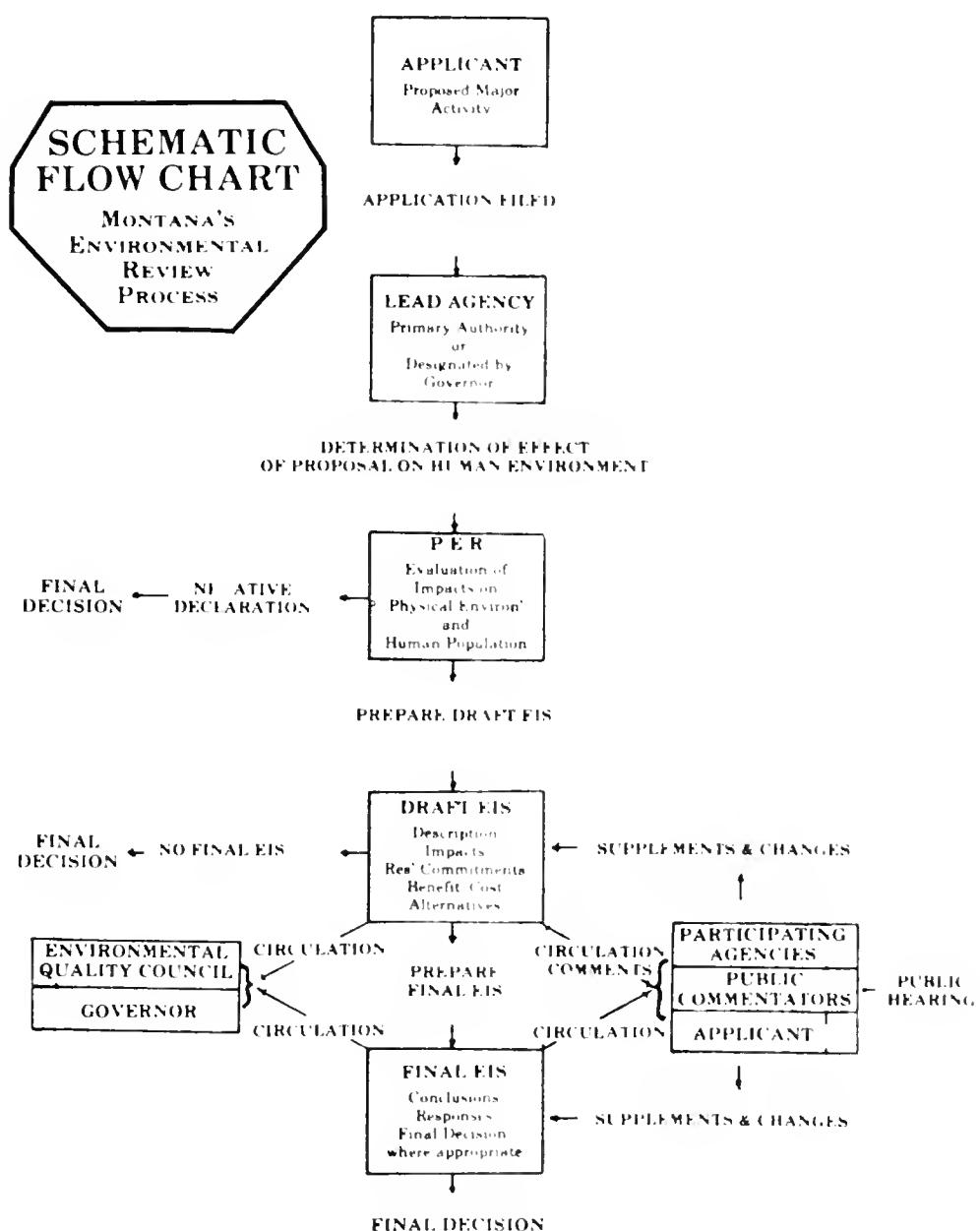
Federal courts have interpreted the national law as requiring that the impact statement process be used as a decision-making tool. As such, the process provides relevant environmental, socio-economic, and technical information concerning the proposed action prior to the point at which the decision is made. In addition, the courts have interpreted NEPA as requiring that all criteria be considered in making the decision and that the agencies must give good faith consideration to environmental values.

In Montana, MEPA has been construed more narrowly. Diagram 2 illustrates the MEPA authorized environmental review process. This process is described in a recent publication of the Montana Environmental Quality Council entitled Environmental Impact Statements, and a publication of the Environmental Information Center, Citizens Guide to NEPA, MEPA, and the Environmental Impact Statement Process.

The formal MEPA review process comprises three steps. First an agency completes a Preliminary Environmental Review (PER) on

DIAGRAM 2

MEPA REVIEW PROCESS



Source: Montana Environmental Quality Council

a proposed action. If the PER indicates that the proposed action will result in a "significant impact on the quality of the human environment,"(26-2-603 (5)ARM) the agency then must prepare a Draft EIS. This document must discuss a wide range of environmental and socio-economic criteria, as specified by the statute and Administrative Rules of Montana. Depending on the comments received on the Draft EIS, the agency then decides whether a Final EIS is necessary. Specific provisions exist for the length and format of the EIS, for inter-agency cooperation, for resolution of statutory conflicts, and for public hearings.

The impact statement process is designed to achieve the following policy goals:

- (1) Encourage public participation in the decision-making process;
- (2) Disclose environmental, economic, and social impacts of the proposed action;
- (3) Suggest measures to mitigate adverse impacts;
- (4) Provide the type of information upon which MEPA
- (5) Provide a reference document for future actions and issued related to the area under study.

The Legal Scope of MEPA

The most important debate over MEPA concerns whether the act is substantive, or simply procedural. In other words, when other state laws containing specific criteria for granting or denying permits conflict with MEPA, does MEPA enlarge the basis

for making decisions on permit applications, or does it simply require that certain review and disclosure procedures be followed? Can agencies make decisions on the findings of environmental impact statements in areas outside the specific criteria in the particular permit granting statute? State government and industry feel that MEPA is only procedural and should not enlarge the decision-making authority of the specific permit granting statute.

Since NEPA's passage in 1969, many cases have been brought before federal courts in attempts to clarify the substantive authority of NEPA. The position of the federal courts, and the dictates of relevant case law, are summarized below.

All relevant indications of congressional intent, as expressed in the statutory language and legislative history of NEPA, as well as case law interpreting that purpose, emphatically support the conclusion that Congress intended to require that agencies fully consider in their decision-making those environmental factors not explicitly provided for in the substantive mandates of the statutes under which agencies are acting.(3)

To date, the Montana Supreme Court has construed MEPA more narrowly. In the only relevant case, Montana Wilderness Society v Board of Health and Environmental Sciences, the dispute involved the effect of MEPA on a subdivision permit application decision of the DHES. The majority ruled that legislative intent in the Sanitation In Subdivisions Act was to place control of the decision process with local governments. This precluded any state attempt to exercise authority over subdivisions outside the substantive areas in the Sanitation In Subdivisions Act. Two dissenters based

their interpretation on federal case law, and reasoned that there was no irreconcilable conflict among the acts. They stated that MEPA imposed a supplementary responsibility to consider those environmental factors not explicitly enumerated in existing permit granting statutes in the decision-making process. It should be mentioned that federal case law, and a subsequent Montana Supreme Court decision in Kadillak v Anaconda Company, have concluded that, where a clear and unavoidable conflict exists between MEPA and other statutes, MEPA must give way.⁽³⁾

The Governor created the Commission on Environmental Quality in 1975 to formally implement MEPA. This body is responsible for promulgating uniform rules for agency adoption. The Montana Department of State Lands (DSL), DNRC and DHES adopted their most recent rules on July 1, 1980. These rules state that where other statutory provisions prevent the department from fully complying with MEPA, notification shall be given and a proposed course of action suggested to "enable the department to comply to the fullest extent possible" with MEPA(Section 25.2.617, ARM).

Each of the latest two legislative sessions have attempted to resolve the substantive or procedural issue. Various bills have been introduced to amend MEPA by making its relationship to agency decisions explicit in the context of other permit granting statutes. These died in conference committee. A current court case, Montana Wilderness Society v Montana Department

of State Lands, brought over the department's decision regarding the proposed ASARCO Mine near Troy, may bring the issue to a head. The crux of the plaintiffs' allegations is that DSL refused to "incorporate and integrate natural and social science information into its decision making to provide for minimization or mitigation of environmental degradation." (5) The state continues to interpret MEPA's impact on decision making narrowly and asserts that:

The Department is mandated to issue the permit unless it is demonstrated that reclamation cannot be accomplished or that air and water quality standards will be violated. These are the only grounds the Department may use in denying a permit.

Although MEPA requires that the impact on wildlife and the overall social and economic impact on the community be brought to the attention of the decision maker and the public, it does not authorize denial of the application on these grounds. (4)

The Supreme Court may finally resolve this issue when it renders a decision on this case. Future legislatures may again attempt to define the legal scope of the act.

The EIS Process

The benefits of the EIS process mandated by the act include the formal review process and the provisions for public hearings, for public disclosure requirements, and for identification of adverse impacts. The review process requires that a wide range of social and economic as well as environmental issues be evaluated. Only one other permit granting statute, the MFSA, refers to non-environmental decision criteria.

Several major permit granting statutes, such as the water quality and reclamation laws, contain no provision for an impact statement process.

There have been cases where the EIS process has served to identify problems that were resolved by negotiation, resulting in better and more environmentally compatible decisions. Although the application of MEPA to agency-initiated actions has been less rigorous than to applicant projects, MEPA and the EIS process has exposed the state's recent adoption of the ambient air standards to public scrutiny.

There have been many valuable procedural and definitional clarifications of the EIS process. A review of the most recent rules adopted in July, 1980, and of several other major environmental statutes, indicates that the following recommendations may streamline the process further. Consistency among the different statutes and rules also can be improved.

1) The process of reviewing an application often is extended when an initial application is found to be incomplete, and is returned to the applicant for revisions, additions, etc. Such delays largely are due to failure on the part of the applicant to submit a complete application and to lack of clarity in state requirements. Our findings indicate that these delays could be minimized if industry would initiate early pre-application meetings with the state to determine the requirements necessary for the application.

In the absence of this type of cooperation on the part of industry, the state could require that the applicant submit a pre-application form prior to an application. This submittal could initiate a cooperative state/applicant process, the sole objective of which would be to insure that an application is complete.

2) Potential disagreements and litigation over the contents and adequacy of an EIS may be reduced through the use of a pre-EIS scoping process. This process would take place after it has been determined that an EIS will be written, but before the research and data gathering begins. The applicant and state would hold a joint public hearing in the affected area to describe the proposed action and to receive input regarding issues which the public deems important. A determination then could be made concerning primary and secondary study issues, with the understanding that the EIS process itself might identify previously unknown issues. This process also could contribute to more precise study cost estimates.

3) MEPA (and the MFSA) requires the preparation of environmental impact statements. The following table identifies major state permit granting actions, statutory references to decision time frames, and their relationship to MEPA.

TABLE I

Major Permit Granting Statutes

	<u>Statutory Reference to Decision Time</u>	<u>Statutory Reference to MEPA/EIS Process</u>
Major Facility Siting Act		
Air Quality	18 months	N/A
Final Decision	42 months	N/A
Air Quality Permit	8 months	Yes
Water Quality Permit	None	No
Water Use Permit	None	Yes
Metal Mine Reclamation	14 months	No
Strip Mine Reclamation	8 months	No

Generally, the statutory reference to time frames indicates that the department "shall notify" the applicant within a specified number of days. The Metal Mine Reclamation Act states that "the department and the applicant shall negotiate" the time frame for a final decision within the maximum time allowed. It has been suggested that the latter approach allows the department the flexibility to adjust the statutory maximum time limits under different situations, while the former approach simply results in the maximum time being taken. If this is the case, it would be desirable either to change the statutory time references so that this flexibility is allowed, or to change the MEPA rules to achieve the same goal. All permit granting statutes should include time frame references and explicit provisions for writing impact statements required under MEPA.

4) Section 26.2.605, ARM of the uniform rules implementing MEPA state that the "draft environmental impact statement shall include . . . the proposed agency decision on the proposed action, where appropriate"(emphasis ours). The impact statement process largely benefits the goals of public discussion and disclosure, and as such should properly contain a "tentative" or "proposed" decision at the draft stage so that industry and the affected public can react to a specified course of action. The departments usually are in position to prepare a decision after the draft EIS is completed, since at this point probably 95 percent of the analysis has been completed. Further, the combination of a "tentative" decision in the draft and the subsequent comments on that proposed decision may act to reduce the eventual possibility of litigation. Whether this is possible is a legal matter, and outside the scope of this study. However, this should be reviewed by the interim study committee mentioned above.

5) Draft and Final EIS's should obtain all proposed measures designed to mitigate adverse impacts.

6) Two state departments, DSL and DNRC, have in-house capabilities for preparing environmental impact statements. DHES has a limited staff capacity to write environmental impact statements. It would be more efficient, and result in a more consistent and professional product, to consolidate EIS writing responsibilities in one agency of state government. Substantial expertise is gained from doing the necessary research

and from preparing impact statements. Having one group perform this function will allow that group to become as knowledgeable and professional as possible. If this function is consolidated, the team should have a permanent staff with the appropriate expertise and the funding necessary to hire and retain top quality professionals.

7) When a state agency is precluded from writing an EIS because of time constraints or committed personnel, an outside contractor, or several contractors, may be retained to perform the function. This approach can result in disagreements between the state and applicant over the quality of the work and, perhaps over impacts and proposed mitigative measures. An alternative approach to this problem is the use of an outside contractor under a "third party" agreement, where the contractor is selected jointly by the applicant and lead agency. The applicant may recommend a list of consultants to the agency, who then prepares and circulates the Request for Proposal, and selects a contractor on the basis of proposals. Since this approach may result in potential contractors being unduly "beholden" to the applicant, the agency may circulate the Request for Proposal to as many potential bidders as it may wish, even though the applicant may "recommend" only a few. Another option would be to have the agency and the applicant jointly choose the contractor, after the agency reduces the potential contractors to two or three, after bid opening.

ADDITIONAL CONSIDERATIONS

1) The relationship between state government and the private sector often has been characterized as adversarial. Although the State performs legitimate functions requiring permit applicants to spend time and money, and perhaps modify project designs, these duties can, and should, be carried out in a spirit of cooperation. It is essential to recognize that the private sector initiates real investment and growth, and that, to the extent that these initiatives are compatible with public policy, the state's functions should act to complement them, not to frustrate them. The state by no means should abdicate its legitimate functions but should ensure that its regulatory personnel objectively and expeditiously administer state laws and regulations.

2) Industry desires consistency and predictability in environmental regulation. Evaluation of financial returns on large capital investments requires that the risk of non-expected additional capital expenditures be minimized. When regulations change often, resulting in large, new pollution control expenditures, the perceived risks associated with new facilities increase substantially. In order to make regulation more predictable, a "grandfather clause" concept should be investigated for existing facilities. This would mean that once a regulation requiring new investment were adopted and

a compliance schedule determined, as long as the facility was making a good faith effort toward compliance it would not be subject to any new, stricter related regulations for a specified period of time, say five, ten, or fifteen years. A modified version of this would exempt the existing facility from any new related regulations that were based upon "public welfare" criteria, but not from those based upon "public health" criteria.

3) Governor Schwinden and the legislature have recently proposed a major reorganization of state environmental and resource management responsibilities. This topic has been discussed ever since state permitting responsibilities began to grow a decade ago. Typically, each permit regulates only one aspect of a development, and each permit may involve a unique review process and time schedule. Consequently, the act of reaching a decision concerning a project can be unduly complicated for the state and the applicant.

Environmental protection and regulation responsibilities now are centered principally in four departments: the DSL, the DHES; the DNRC; and the Department of Fish, Wildlife and Parks. We support the administration's and legislature's recommendations to move the land reclamation responsibilities of DSL to DNRC, and the Forestry Division of DNRC to DSL, and the solid waste, subdivision and air and water quality functions of DHES to DNRC. These have the effect of moving environmental protection programs with permitting responsibilities

to the agency that administers another major permitting program, the MSFA, and moving a resource management program (Forestry) to the agency that administers all state lands. This appears to be a step in the right direction -- functional consolidation of resource management and conservation programs, and environmental regulation and permitting programs. An extension of this effort would be to move other resource management programs such as water resources and conservation districts into DSL, or a separate Department of Resource Management. Most of the Department of Fish, Wildlife and Parks also could become part of the resource management agency.

4) The establishment of a Permit Coordinator in the Governor's Office is another alternative to major agency reorganizations. This individual would be the initial contact for all applicants for permits. He would be responsible for informing the applicant of all necessary permits, of where to obtain them, and of administrative processes. This person also would be responsible for coordinating agency efforts, for resolving jurisdictional disputes, and for ensuring that duplication is reduced by consolidating public meetings, hearings, and the preparation of environmental impact statements. This alternative could prove to be a very cost-effective approach to eliminating confusion on the part of the applicant, and overlap and duplication on the part of the state.

5) Citizen participation is important to participatory democracy. However, during the course of the present investigation, a consensus emerged that the citizen board approach to environmental permitting decisions should be improved. Dis-satisfaction with the way the decision process has worked has centered on the board members' lack of technical expertise in the areas in which they must make decisions. The board hearings require a great deal of time and expense, and no elected officials are directly accountable for the final decisions.

One suggestion by Mr. Dave Gleason of Dreyer Brothers, Inc., is that the boards should be appellate review entities, like the BHES, not decision-making entities, like BNRC. He suggests that this role more clearly fits the original intent regarding citizen boards, that they perform a review function and therefore need not become technical experts.

Another option to increase the efficiency of the citizen board role would be to consolidate the BHES and BNRC into a Board of Environmental Review. This should be a small board, with no more than five members, all of whom must meet certain minimum qualifications in terms of professional expertise and background. Establishment of board positions as full time jobs, and the provision of additional funding to hire needed, expertise, could increase the Board's ability to make intelligent and informed decisions.

A final approach suggested by individuals both in and out of state government is simply to do away with the two boards.

Either the department Director can be given the authority to make all final permit granting decisions, or a board comprised of several agency Directors can make the final decision. Currently, the Director of DSL makes final decisions concerning permit applications to that department. This process appears to work fairly well, and does not require any board hearings or review. Individuals who may object to vesting this amount of decisionmaking authority in one person might feel more comfortable with a small group of relevant agency Directors making the final decision. An additional benefit of this approach would be an increase in the public accountability of the decision makers.

The key advantages of this system are that it acknowledges the basic fact that these decisions are political decisions, and makes the Governor directly accountable, through his appointees, for the final decision. The resulting program is apt to be streamlined significantly because it does not include provisions for lengthy board review, and because the decision making will rest with individuals who are more knowledgeable about the complex issues raised by many permit applications. In our judgment, these advantages outweigh the questionable merits of the citizen boards in the terms of democratizing the decision-making process.

FOOTNOTES

- 1) Lopach, James J. and Gregory J. Petesch, Reforming The Montana Major Facility Siting Act, University of Montana, Missoula, Mt., November 1978
- 2) Auger, Camilla S. and Martin E. Zeller, Siting Major Energy Facilities: A Process in Transition, The Tosco Foundation, Boulder Co., October, 1979
- 3) Tobias, Carl, The Effect of the Environmental Policy Act on Preexisting Agency Authority, University of Montana Law Review, Missoula, Mt. Summer, 1980
- 4) Complaint, Cabinet Resources Group and Montana Wilderness Society v Montana Department of State Lands, personal communication with John North,

